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No. 80-129

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

BOARD OF SCHOOL COMMISSIONERS OF THE CITY OF INDIANAPOLIS, INDIANA, *et al.*,
Cross-Petitioners,

v.

THE METROPOLITAN SCHOOL DISTRICT OF PERRY TOWNSHIP, MARION COUNTY, INDIANA, *et al.*,
Respondents.

CROSS-PETITIONERS' REPLY BRIEF

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ARGUMENT

All of the briefs in opposition (filed by the Lawrence and Perry school corporations, the United States and the Buckley intervenors)[1] focus less on the substance of the IPS claims for an inter-district remedy that matches the scope of the violation than upon an effort to cast doubt on the propriety of these issues being raised by school officials.

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[1] This reply brief is filed in response to the briefs in opposition of: The Metropolitan School District of Perry Township, Marion County, Indiana, et al. (hereinafter Perry Brief); The Metropolitan School District of Lawrence Township, Marion County, Indiana, et al. (hereinafter Lawrence Brief); United States (hereinafter United States Brief); and Donny Brurell Buckley, et al. (hereinafter Buckley Brief).

In that vein, several of the briefs note accurately that none of the other parties is seeking review of the adequacy of the remedy granted below (Perry Brief p. 9, United States Brief p. 18, n. 18) and the United States goes further by implying inaccurately (United States Brief p. 6) that only IPS challenged below the adequacy of a limited one-way remedy. In fact, the United States itself submitted in the district court that the most appropriate remedy would be a plan in which IPS annexed all or portions of the Marion County suburban systems, leaving the extent of suburban involvement in the first instance to IPS (JA 103-104). While the government may choose not to pursue its claim for broader remedy in this Court, the record cannot be revised to eliminate its prior support of a remedy being sought by IPS.[2] Similarly, it is hinted (Lawrence Brief p. 12, United States Brief p. 18, n. 18) that if the Buckley intervenors are not dissatisfied with the remedy ordered below, no one else should be. The fact, however, that the Buckley intervenors, a single black family, do not perceive themselves to be adversely affected by the one-way character of the relief hardly suggests that other minority students would not suffer discrimination.[3]

Most pertinent, this Court has recognized the central role of local school authorities in developing plans for

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[2] At the same time, it should be noted that the district court was not confined in its choices to an inadequate one-way plan and a plan for restructuring school districts. IPS preseated plans for the reciprocal transfer of students between city and suburbs that did not call for annexation or consolidation (JA 102-103).

[3] Although the Buckley intervenors alleged that they represented a class in seeking some form of inter-district relief, the class has never been certified. In the district court, IPS sought to present testimony by the head of the Indiana State Conference of branches of the National Association for the Advancement of Colored People (and President of the Indianapolis branch) as to the inequitable character of the one-way plan. The district court excluded the testimony.

the full implementation of constitutional rights, *Brown II*, 349 U.S. at 299, and has encouraged affirmative measures in the exercise of this role. See, e.g., *Swann* v. *School Board of Charlotte-Mecklenburg*, 402 U.S. 1, 16 (1971). Federal courts have frequently permitted local school officials to serve as plaintiffs in school desegregation cases in order to press claims against other parties whose involvement was necessary to secure a complete remedy. See, e.g., *Evans* v. *Buchanan*, 447 F.Supp. 982 (D.Del., 1978), *aff'd* 582 F.2d 750 (3rd Cir., 1978), *cert. denied* —— U.S. ——, 64 L.Ed. 2d 278 (1980); *Bradley* v. *School Board of The City of Richmond, Virginia*, 338 F.Supp. 67 (E.D. Va., 1972), *rev'd on other grounds*, 462 F.2d 1058 (1972), *aff'd by an equally divided court*, 412 U.S. 92 (1973). Indeed, it has been recognized that in some circumstances the interests of school officials and of the students they serve are so closely related that the former may assert not only their own rights to be free from interference in carrying out their desegregation obligations but the rights of black students as well. *Brewer* v. *Hoxie School District No. 46*, 238 F.2d 91, 104 (8th Cir., 1956). See also *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Truax* v. *Raich*, 239 U.S. 33 (1915); *Akron Board of Education* v. *State Board of Education of Ohio*, 490 F.2d 1285, 1289-90 (6th Cir., 1974), *cert. denied*, 417 U.S. 932 (1974). Accordingly, the vague suggestions of respondents that the merits of the cross-petition should not be examined because IPS lacks standing or somehow is an inappropriate party are totally without foundation.[4]

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[4] Perry respondents offer the additional novel idea that IPS somehow mooted its case by opposing stay applications of the interdistrict plan ordered below. (Perry Brief pp. 8-10). Under this theory, unsupported by the citation of any relevant authority, a party awarded compensatory damages but denied punitive damages would be estopped from appealing the denial of punitive damages if he opposed a stay of the award of compensatory damages. Cases do not become moot on appeal unless "an event occurs which renders it

On the merits, respondents' principal argument against review of the remedy is that the inequitable character of the one-way plan is mitigated fully by the fact that within IPS some white students are assigned to formerly black schools (United States Brief p. 18, n. 18, Buckley Brief p. 10). Underlying this contention is a misconception that the issue posed by cross-petitioners is one of numerical or proportional parity [5] and the erroneous notion that equity in the assignment of children to public schools is no more than a numbers game.

The fundamental inequity of remedy approved below is that it perpetuates the very kind of racially unequal treatment in public schools that gave rise in the first place to the desegregation litigation. In the words of Dr. Thomas K. Minter, former Superintendent of the Wilmington school system, quoted with approval in *Evans*

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impossible for this Court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever." *Mills* v. *Green*, 159 U.S. 651, 653 (1895). If Perry's point is treated as a waiver claim, parties, of course, are not deemed to have waived their rights unless it is clearly demonstrated that they intentionally relinquished a fundamental right. See, e.g., *Aetna Insurance Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937); cf. *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938). IPS did no such thing. In opposing a stay of what it regarded as partial relief, IPS carefully reasserted its contention that the remedy ordered was inadequate. (Perry Brief p. A14).

[5] Lawrence's notation (Lawrence Brief p. 12) that IPS' "preferred" plan "would have generally bused black students from their own districts nine years out of twelve" while busing white students only three years out of twelve is totally beside the point. The laws of mathematics inevitably result in racial groups which are a minority bearing a share disproportionate to their numbers of the reassignment burdens of any plan which calls for thorough desegregation. See *Evans* v. *Buchanan*, 582 F.2d 750 (3rd Cir. 1978), *cert. denied*, —— U.S. ——, 64 L.Ed.2d 278 (1980). The issue, rather, is whether the plan visits unequal treatment on minorities by *unnecessarily* taxing them with the burdens of reassignment.

v. *Buchanan*, 582 F.2d 750, 760-761, n. 7 (3rd Cir., 1978):

> In undoing the situation, if you put the burden of the remedy on those who have been victimized, it appears to me that the majority society is again putting the burden for—it's almost saying 'Go out and heal yourself' . . . [W]hen the burden is equally shared, it seems to me that it recognizes the duty of the total society to rectify a wrong, and not just the victims.

The "wrongs" in this case were inter-district violations that brought about the racial disparities that exist between city and suburban school districts. The demands of equity in the correction of these wrongs could hardly be met, as respondents suggest, by providing equity in the *intra*-district remedy. Respondents are wrong in their assertion (Lawrence Brief pp. 10-11) that the courts below have treated the inter-district and intra-district remedies as inextricably interrelated. In its most recent decision, the Court of Appeals said pointedly that "we can think of no reason why an intra-district plan should not be implemented in September, 1980, regardless of the status of the interdistrict remedy at that time." (JA 28).[6] To have ruled otherwise and dissolved the

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[6] Contrary to the claim of the Lawrence respondents (Lawrence Brief p. 11) that the district court "has refused until now to order complete intradistrict relief without interdistrict relief," the district court on August 18th ordered just such a plan, and the plan was implemented in September. Contrary to the claim of the United States (United States Brief p. 2, n. 3) the plan is in no way limited or contingent on further consideration by the parties, but provides for complete desegregation for all students except those who are slated to participate in the inter-district plan. The view of the Court of Appeals that intra-district remedy was not to await resolution of the inter-district issues is not new. The Court called for completion of the intra-district remedy in a 1974 opinion (503 F.2d 68, 80) and since then, has brought about completion of phases of the plan, e.g., complete desegregation of high schools within IPS, as rapidly as they were ready for implementation.

distinctions between inter- and intra-district violations could have placed the court in conflict with this Court's decision in *Milliken* v. *Bradley*, 418 U.S. 717 (1974).

While the demands of equity for a reassignment plan which is fair and nondiscriminatory in its treatment of minority students may be tempered by other educational needs, respondents have failed to identify such needs. They do no more than point to the cursory references below to "generally better facilities in the outer districts" and the desirability of closing "obsolete schools" within IPS, references unsupported by any record evidence comparing IPS with other Marion County systems or by any other documentation. (See IPS Cross-Petition p. 10).[7]

Other purported justifications for the one-way plan are equally undocumented and even more remote. The United States' suggestion (United States Brief p. 18, n.18) that the limited remedy ordered below "may encourage residential movement across the line in either direction" is speculation built upon no evidentiary foundation and its notion that unfair or discriminatory burdens should be left for resolution by the courts at some unspecified future date runs counter to this Court's statement about the limited nature of the continuing role of federal courts after having ordered desegregation. See *Swann*, 402 U.S. at 31; *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976). Most important, any proposal to defer action on aspects of a reassignment plan that unfairly burden or discriminate against minority children totally ignores the standard

[7] Since this case began in 1968, IPS has closed twenty-nine elementary schools and a high school. In 1980 alone, IPS closed eleven elementary schools. Even if the record in 1973 disclosed a basis for concluding that existing IPS facilities were inferior to those in the suburbs, it would not provide a current justification for the one-way plan.

that desegregation plans must "promise to work realistically *now*." *Green* v. *County School Board of New Kent County*, 391 U.S. 430, 439 (1968).

Respectfully submitted,

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